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IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1966

No. 1313

PERTH AMBOY DRY DOCK CO.,

Petitioner.

vs.

JOHN HANSEN,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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TABLE OF CONTENTS

	PAGE
CITATIONS TO OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	3
STATUTES INVOLVED	3
STATEMENT OF CASE	3
REASONS FOR GRANTING WRIT	5
CONCLUSION	11
APPENDIX:	
"A"—Opinion of the Supreme Court of New Jersey	1a
"B"—Mandate on Reversal	13a
"C"—Per Curiam Opinion of Superior Court of New Jersey, Appellate Division	14a
"D"—Petition for Rehearing to New Jersey Supreme Court	15a
"E"—Relevent State Statutes	16a
"F"—Relevant Federal Statutes	17a

Cases Cited

Allisot v. Federal Shipbuilding & Drydock Co., 4 N. J. 445 (1950)	8
Avondale Marine Ways v. Henderson, 346 U. S. 366	7
Calbeck v. Travellers Insurance Co., 370 U. S. 114, 8 L. Ed. 2d 368 (1962)	4, 6, 10

PAGE

Continental Casualty Co. v. Lawson, 64 F. 2d 802 (5th Cir.) 9

DeBardeleben Coal Corp. v. Henderson, 142 F. 2d 481 10

DeGraw v. Todd Shipyards Corp., 133 N. J. L. 402 ... 8

Flowers v. Travelers Insurance Co., 258 F. 2d 220, cert. denied, 359 U. S. 920 9

Grant-Smith Porter Shipping Co. v. Rhode, 257 U. S. 469 ..... 6, 8

Hahn v. Ross Island Sand & Gravel Co., 358 U. S. 272 (1959) 9

Kelly v. R.T.C. Shipbuilding Corp., 87 N. J. Super. 313 (App. Div. 1965) 8

Motor Boat Sales Co. v. Parker, 314 U. S. 244 (1941), rehearing denied, 314 U. S. 760 (1942) 6

Northern Coal & Dock Co. v. Strand, 278 U. S. 142, 49 S. Ct. 88, 73 L. Ed. 232 (1928) 8

Royal Indemnity Co. v. Puerto Rico Cement Corp., 142 F. 2d 237, certiorari denied, 323 U. S. 756 (1944) 6

Ryan Stevedoring Co. v. Pan. Atl. S.S. Corp., 300 U. S. 124 (1956) 6

Statutes Cited

L. 1911, c. 95-7 2

N.J.S.A. 34:15-7 (New Jersey Workmen's Compensation Act) 2, 3, 5, 7

Article 2 2

28 U.S.C.:

Sec. 1257(3) 2

PAGE

33 U.S.C.A. (Longshoremen's and Harbor Workers' Compensation Act):

Secs. 901-902 (plac. 4), 903-905 ..... 3-7, 10, 11

Sec. 903(a) 10

46 U.S.C.A.:

Sec. 4 10

Secs. 18, 46, 51, 493 ..... 3, 11

Other Authorities Cited

Larson:

p. 413 9

S. Rep. No. 673, 69th Cong., 1st Sess., 16 6

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To the Honorable the Chief Justice of the United States, and the Associate Justices of the United States:

(*Italics mine unless otherwise noted.*)

Petitioner, Perth Amboy Dry Dock Co., prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey, entered in the above cause on January 23, 1967, upon which a Mandate issued pursuant to the practice in that Court made and provided, by which it is ordered and adjudged that the judgment of the Superior Court of New Jersey, Appellate Division, reversing the compensation award made to the petitioner below, and against the respondent, Perth Amboy Dry Dock Co., be

itself reversed, and reinstating the earlier award of compensation to the petitioner below, under Article 2 of the New Jersey Workmen's Compensation Act, L 1911 c 95-7 (N.J.S.A. 34:15-7, its amendments and supplements). *vide* Appendix "E".

Citations to Opinions Below

The opinion of the Supreme Court of New Jersey, 48 N. J. 389, reinstated the original compensation award made by the N. J. Department of Labor and Industry, Division of Workmen's Compensation (A65a to A89a). The Supreme Court opinion dated January 23, 1967, and its Mandate following same are respectively printed in Appendices "A" and "B". The award had been reversed by the Middlesex County Court on appeal, and is found at A10a to A14a of the Appendix submitted to the Superior Court of New Jersey, Appellate Division on petitioner's appeal to that Court. The Appellate Division in an unreported opinion affirmed the County Court and is printed in Appendix "C". Our Petition to the Supreme Court of New Jersey for Rehearing, was denied by its order dated February 15, 1967 and printed in Appendix "D".

Jurisdiction

The opinion and judgment of the Supreme Court of New Jersey, containing the reversal of the Superior Court of New Jersey, Appellate Division and its Mandate, are respectively in Appendices "A" and "B".

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. A. 1257(3).

Question Presented

Does not the Longshoremen's and Harbor Workers' Compensation Act have exclusive jurisdiction thus barring application of the N. J. Workmen's Compensation Act under the following facts, where

(a) An employee, engaged as a painter by a dry dock company, which was located on a navigable stream of the United States, was injured while paint lettering the name of a customer's completed ship on its stern.

(b) The ship was so long it projected beyond the dry dock and he performed his work from a ladder on a float resting on a navigable stream of the United States.

(c) The painting being performed for the ship owner was in obedience to the shipping laws of the United States. vide Appendix "F".

Statutes Involved

The New Jersey Workmen's Compensation Act of 1911, Chapter 95, Appendix E, Longshoremen's and Harbor Workers' Act, Title 33 U. S. C. A. Sections 901, 902 (plac. 4), 903, 904 and 905; Title 46 sections 18, 46, and 51 (shipping), and Title 46, section 493 (passengers and merchandise). They are printed in Appendix F.

Statement of Case

Following the filing of a Workmen's Compensation claim petition based upon the New Jersey Workmen's Compensation Act of August 17, 1962, the employer served a Notice of Motion to dismiss the claim petition upon two grounds (a) the N. J. Department of Labor and Industry lacked jurisdiction over the subject matter, and (b) that receipt of benefits (by the petitioner) under the Federal statute

was an election of remedy precluding receipt of State benefits, which was discussed by the Judge of Compensation during his determination of the question of liability of the petitioner's employer. The motion was deferred until the time of trial, and subsequent to the service of such notice of motion, and more particularly on August 17, 1962, the employer filed its answer, setting up both contentions for the dismissal of the claim petition, later eleminating reason (b). In dealing with the merits of the controversy, briefs were filed by the respective parties.

The respondent urged that *Calbeck* v. *Travellers Insurance Co.*, 370 U. S. 114; 8 L. Ed. (2d) 368 (1962) warranted the single conclusion that the State Court had no jurisdiction to entertain the action. *Vide* Appendix to appellant's brief, Superior Court of New Jersey, Appellate Division (A67a-23 to A68a-13). The Notice of Motion did not appear in the record, but as earlier stated, the County Court had it before him and passed upon the merits of the contention, dismissing the claim petition under the employer's contention that the N. J. Department of Labor and Industry lacked jurisdiction over the subject matter. At each stage of the litigation the employer has contended that petitioner's exclusive remedy was under the Longshoremen's and Harbor Workers' Act. The injured employee testified that the dry dock was entirely in the water of the Arthur Kill, a navigable stream of the United States and there is no contradictory evidence.

The County Court further concluded that there was no concurrent State jurisdiction to hear and determine the matter; that the injured was not working on a major repair project, nor was there an conversion of the ship taking place. He concluded that petitioner's remedy was exclusively under the Longshoremen's and Harbor Workers' Act and thereupon dismissed the claim petition. The

County Judge's decision above noted, was made on August 4, 1965 and is printed in Appendix to appellant's brief A10a to A14a, being followed by an Order of Reversal and Dismissal of Claim Petition (A15a to A16a).

Following the affirmance of the dismissal of the claim petition by the Appellate Division, petitioner applied to the Supreme Court of New Jersey for certification, which was granted. As earlier stated the Supreme Court of New Jersey reinstated the original compensation award to the claimant. Following the Supreme Court opinion and its mandate, the employer filed its Petition for Rehearing, wherein it continued to assert that (a) the doctrine of "twilight zone" was not applicable, and (b) painting the name of the ship on its stern was required of its owner under the Federal statute and a penalty was imposed for non-compliance.

Reasons for Granting Writ

I urge that there is a conflict on the question of law on the issue involved, as determined by this Court, and a contrary holding by the Supreme Court of New Jersey. It is our contention that the Supreme Court of New Jersey has decided this Federal question of substance in a way probably not in accord with the applicable decisions of this Court.

I contend that the application of the New Jersey statute on which the award was based invaded the exclusive jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act. I also contend that the job on which the claimant was injured was in the performance of the Federal statutory duty imposed upon the owner of the ship to paint the name of the ship on its stern.

This Court has impliedly held that section 903 of the Longshoremen's and Harbor Workers' Act sets up a com-

plete system of workmen's compensation effective in the Federal field, which necessarily bars its invasion by State legislation. *Royal Indemnity Co.* v. *Puerto Rico Cement Corp.*, 142 F. (2d) 237 *certiorari* denied 323 U. S. 756 (1944). A similar ruling was made by this Court in *Ryan Stevedoring Co.* v. *Pan. Atl. S.S. Corp.*, 300 U. S. 124 (1956).

In *Motor Boat Sales Co.* v. *Parker*, 314 U. S. 244 (1941), rehearing denied 314 U. S. 760 (1942) it is held that no specious reasoning shall serve to remove a claim within Federal jurisdiction into that of a State Court. It further suggests that such presumption favoring exclusive Federal jurisdiction cannot be removed by mere semantics.

In the now famous opinion of this Court in *Calbeck* v. *Travellers Insurance Co.*, 370 U. S. 114 (1962), Justice Brennan quotes from *Grant-Smith Porter Shipping Co.* v. *Rhode*, 257 U. S. 469 the following:

> "But (above case) had made clear that State compensation statutes could not, constitutionally be applied to injuries to employees injured in repair work on completed vessels on navigable waters."

A serious discussion of the reason for the passage of the Longshoremen's and Harbor Workers' Act is noted in the footnote of p. 121 of the *Calbeck* opinion.

See S. Rep. No. 673, 69th Cong., 1st Sess., at 16:

> "The purpose of this bill is to provide for compensation in the stead of liability, for a class of employees commonly known as 'Longshoremen.' These men are mainly employed in loading, unloading, refitting and repairing ships, et seq."

I urge that Hansen's service comes within this class.

The opinion below would seem to follow the old philosophy of "maritime but local" and thus avoid exclusiveness of the Longshoremen's and Harbor Workers' Act. The interesting philosophy touched upon at p. 377 of *"Calbeck"* relating to the subject of "twilight zone" dissolves, since here there could be no difficulty in determining whether or no the State law was applicable. The limited application of the twilight zone principle emerges only where at first blush there might be doubt as to whether the claim rested within the coverage of the local law or of the Longshoremen's and Harbor Workers' Act. There was no such difficulty here. Here, the accident occurred on a completed ship resting on navigable waters of the United States while the injured was performing an act required under Federal law.

In *"Davis"* the accident happened to a structural steel worker in dismantling a bridge across a navigable river. His work was upon a land structure, which is a far cry from the picture here presented.

The concurrent jurisdiction applied in the cited case resembled the pronouncement of this Court in *Avondale Marine Ways* v. *Henderson,* 346 U. S. 366, wherein the injured suffered his accident on land, thus permitting the application of the concurrent jurisdiction principle. In *"Calbeck"* the similarity I urge, is pointed out in its discussion of the issue in *Avondale Marine Ways* v. *Henderson, supra.*

In the opinion below it is stated that petitioner's employment was sufficiently local in character as to make appropriate the N. J. Workmen's Compensation Act. The opinion further states:

> "Petitioner worked four to five weeks each year exclusively on land."

This apparently was calculated to add force to a contention of concurrent jurisdiction. Such philosophy has been rejected by this Court in *Northern Coal & Dock Co.* v. *Strand,* 278 U. S. 142; 49 S. Ct. 88; 73 L. Ed. 232 (1928). In that case the employee worked both upon the land and upon the water, but received fatal injury while doing stevedoring work on a vessel lying in navigable waters. In the holding that the Federal jurisdiction was paramount, the following cogent statements appear:

> "The fact that Strand worked the major portion of the time upon land is unimportant. He was upon the water in pursuit of his maritime duties when the accident occurred."

In the instant case the Supreme Court of New Jersey improperly noted as important that of the fifty-two weeks of employment per year, the injured worked for five weeks on land.

The reference made below to *Grant-Smith Porter Ship Co.* v. *Rohde,* provides no aid to the position of the petitioner below, since there the injured was working on a ship under construction, resting on navigable waters of the United States. Federal jurisdiction was not exclusive because it was not a completed ship.

The opinion below cites *Allisot* v. *Federal Shipbuilding & Drydock Co.,* 4 N. J. 445 (1950); *DeGraw* v. *Todd Shipyards Corp.,* 133 N. J. L. 402 and *Kelly* v. *R.T.C. Shipbuilding Corp.,* 87 N. J. Super. 313 (App. Div. 1965), as though these cases would turn back our contention that the instant injury came within the exclusive jurisdiction of the Federal law. An examination of the cases presents the factual situation of extensive repairs, practically a reconstruction of the vessels involved. The factual picture involved was, therefore, entirely different from the one here presented.

The opinion below cites *Hahn* v. *Ross Island Sand & Gravel Co.*, 358 U. S. 272 (1959), in support of its conclusion. It completely overlooks the holding of that case at 372 that:

> "Where admiralty jurisdiction is clearly presented the Federal remedy is mandatory."

In *Flowers* v. *Travelers Insurance Co.*, 258 F. 2d 220 *cert.* denied 359 U. S. 920, it was concluded that a welder injured while making repairs on an ocean-going tanker was held to be within the exclusive coverage of the Longshoreman's Act. On this score the Larson Text p. 413 reads:

> "There is no twilight zone for injuries sustained on navigable waters while employee is engaged in essential repairs to an existing vessel."

The opinion below would reject our contention with a very short statement, that the twilight zone applied though the accident happened on navigable waters, because there was such sufficient connection with the State that a State remedy will be presumed valid, even though there might be Federal coverage.

The opinion below completely disregarded the fact that the name painting was directed by Federal legislation. It was a maritime service imposed upon this claimant's employer.

The opinion below likewise rejects this Court's approval of the philosophy of *Continental Casualty Co.* v. *Lawson*, 5th Cir. 64 F. (2d) 802, 804, that Federal Compensation laws should be liberally construed to cover every case where the injury occurs on navigable waters and where within the rule of (*Jensen*) . . . the action would have been in admiralty.

I would point out other Federal statutory enactments supporting my contention. Under Title 33, 902, 4th par.

> "The term 'employer' means an employer any of whose employees are in maritime employment, in whole or in part, upon navigable waters of the United States (including any dry dock)."

Undoubtedly Title 46, U. S. C. A. indicates coverage and control of coastwise and trans-oceanic commerce by water. There is nothing local in the performance of the Federal statutory requirements imposed upon owners of ships. I urge that only specious reasoning would bring Hansen's injury within the "twilight zone" philosophy.

The Federal Commissioner of Customs is charged with the obligation of preparing and publishing a list of vessels of the United States belonging to the commercial marine, specifying the official number, signal letters, names, etc.

Vide Title 46, sec. 4.

Every vessel is obliged to have a "home port." Title 46, sec. 18.

In *"Calbeck"* at p. 378, we find approval of the philosophy of *DeBardeleben Coal Corp.* v. *Henderson,* 142 F. (2d) 481, 483, 484. The philosophy expounded there is that the Federal legislation left no room for doubt that Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter; Title 33, §903(a) is not a relinquishment of any power, but rather Congressional intention not to regulate beyond its Constitutional power and that no ground is to be yielded to State jurisdiction.

I urge that a short distillation of the controlling philosophy of this Court is that where, as here, the injury occurs on a completed vessel resting in navigable waters of

the United States to a workman engaged as Mr. Hansen was, his claim is exclusively under the Longshoremen's and Harbor Workers' Act. The obligation to paint the name of the ship was imposed by Federal law upon the owner. A violation of this statutory injunction imposes a penalty upon the owner, Title 46, sec. 46. The several statutory enactments with respect to the same clearly establishes that it was not within the jurisdiction of the State of New Jersey.

The opinion below would place this case either within the "twilight zone" or "local concern" philosophy. I urge that neither is applicable in the light of what I have urged.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[APPENDICES FOLLOW]